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ENVIRONMENTAL DEFENSE FUND
Finding the ways that work

Philip Isenberg, Chair
Delta Stewardship Council
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Re: COMMENTS ON THE 5th STAFF DRAFT

Dear Chairman Isenberg and Council Members:

We are pleased to offer the following comments on the 5th Staff Draft ("Draft") in continuation of our participation with your efforts to develop a Delta Plan. These comments supplement the recommendations that we have made at various DSC meetings and workshops over the course of the past year. EDF concurs generally in the comments submitted by NRDC, Defenders of Wildlife and The Bay Institute, particularly with regard to development of S.M.A.R.T. goals and the need for a clear definition of water supply reliability. EDF also concurs generally in the comments submitted by the Coalition of Environmental, Environmental Justice and Fishing organizations.

Overall, we believe the Draft is largely on track to comply with the requirements of the Delta Reform Act. In particular, we support the Draft's emphasis on reducing reliance on the Delta for water supply. We agree that this aspect of the legislation marks a paradigm shift, and that the State has not yet fully taken advantage of the opportunities provided by this legislation to reduce conflict and increase reliability.

Specific Recommendations for Revision:

1. Adopt a definition of ecosystem success that, while not a return to a state of nature, establishes a resilient, functioning estuary capable of supporting self-sustaining levels of salmon and other native fishes as the standard for the co-equal goal of Delta restoration.
2. Delete the water supply reliability performance measure suggesting that increased diversions from the Delta, relative to prior years, should be a goal of the Delta Plan [at 98]. Progress toward increasing supply reliability should be measured in terms of supply overall, not how much is exported volumetrically from the Delta.
3. Revise Policy ER P1 to provide that the State Board should not only update the WQCP, pursuant to its authority under Clean Water statutes, but should also determine, pursuant

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to its obligations under the Public Trust Doctrine, the flows necessary to protect its trust responsibilities in the Bay and Delta, building on the Flow Criteria report of August 2010.

4. Revise the Delta Restoration Outcome Performance Measures to include:
    a. Development of specific, quantified goals and objectives for ecosystem restoration for the Estuary and key species, including but not limited to attainment of the salmon doubling goal enshrined in both state and federal law by a date certain, not to exceed another ten years.
    b. Revise footnote 46 and related text to accurately reflect the CVPIA doubling requirement which calls for natural production of anadromous fish that are "sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991."
    c. A clear statement that meeting the co-equal goal of Delta restoration means attaining by a date certain a thriving and resilient estuarine ecosystem, capable of supporting self-sustaining populations of salmon and other native species. See, Water Code 85020.
    d. Clarity that ecosystem targets are intended to be actually met, and that "progress toward" is not a sufficient end result.
    e. Clarify that restoration actions should be designed with the specific intent to meet established quantified goals and objectives.
5. Develop a reasonableness standard (not "certainty") for determining how scientific information will be used in decision-making and adaptive management.
6. Revise the recommendation about the completion date for the BDCP to provide that finalization by any date certain cannot be used as an excuse for short-circuiting consideration of alternatives or conducting analysis that the process has failed to conduct to date.

A More Reliable Water Supply For California

One of the most important statements in the Draft provides:

> The reliability of water exports from the Delta watershed should not be assessed based on current contract amounts. Instead, reliability should be a range of expected diversion amounts based upon annual precipitation and dictated by the ecosystem's safe yield, as determined by science and by our infrastructure's capacity to manage wet year and dry year flows. [at 5]

The concept of determining and then respecting the ecosystem's "safe yield" is essential to putting an end to conflict and supply disruptions. The Draft makes the point that reliability is "not as much water as you want, whenever you want, forever." It might be useful to add to that litany "from wherever you want." EDF strongly supports agriculture in California and is committed to a thriving agricultural economy, just as we support providing reliable water supplies for cities and industrial use. Reducing reliance on the Delta, and focusing energy and resources on the development and implementation of alternative sources of supply, is likely a

key factor in bringing California's water conflicts to a resolution, or at least in substantially limiting conflict going forward.

For these reasons, the proposed "outcome performance measure" indicating that the way to measure reliability is to "measure the amount of water made available relative to preceding years," is inconsistent with the sentiments above and is not appropriate as a performance measure for this Plan. We recommend deleting this performance measure, which also includes vague and poorly defined recommendations regarding "increased flexibility" as an outcome measure, from the Plan. We agree that the Plan should include outcome performance metrics for measuring increased water supply reliability. These should be based on: (1) increases in the availability of stable supplies from sources other than the Delta; and (2) the stability of Delta supply and reductions in disruptions due to ecological conflicts.

Restore the Delta Ecosystem

The Draft makes the reasonable point (as EDF has many times) that the Delta ecosystem will not be restored to its "pre-settlement state," but fails to indicate to what state this ecosystem can or should be restored. This is a significant lapse that needs to be rectified at the earliest possible opportunity. [6] We recommend that the Council adopt the following broad narrative definition of success, based on the Legislative vision for the estuary set forth in the Delta Reform Act for this co-equal goal: A thriving and resilient estuarine ecosystem, capable of supporting self-sustaining populations of salmon and other native species. See, Water Code 85020. We concur with the Draft that operating infrastructure "in a way that mimics the natural hydrograph," is a key tool for reaching this objective. However, it is not the ecosystem objective itself. Specific additional recommendations are above.

Science and Adaptive Management

The Draft states that the Delta is "one of world's least understood ecosystems." [17] To the contrary, many observers note that this estuary is one of the most intensively monitored systems on the planet, and has been for decades. We have highly sophisticated computer models of how it physically functions, and it has been the subject of many multi-disciplinary research studies over many years. Indeed, many scientists believe that we have a fairly comprehensive understanding about the things that are wrong with the estuary. The fact that it is a highly altered system (physically and biologically) doesn't mean that we don't understand it. That said, there is no question that our knowledge is far from perfect and it is imperative that scientific study and data collection receive high priority so that our understanding can continue to grow and evolve.

This difference in perception – we know nothing/we know a lot -- illustrates a critical issue at the heart the of the "best available science" debate; is best available "perfect" or "certain" science? The Draft correctly points out that the Delta Reform Act requires a strong scientific foundation for DSC decisions. [35] However, the Draft does not specify how the Council intends to manage the nexus between scientific information and policy making. The Draft contains considerable

detail about best available science meeting a high level of integrity and peer review, which is of course appropriate. But decisions about which actions to take, which not to take and how to adapt the program in response to changing conditions and information, will inherently involve ***judgment based on science*** not merely science alone. A data set, and scientific conclusions about what a data set does or does not reveal, does not dictate a particular policy action. Thus, a key element lacking in the Draft is clarity about how science can and will inform decisions about restoration and operations.

Most critically, the Council should clarify the evidentiary standard that that it (and other agencies) should use in employing what science has to say. As a general rule, scientific information need not provide a "certain" answer in order to reasonably serve as the basis for policy decisions. Agency action (e.g., to change operations, or propose restoration, or eliminate ammonia discharges) is appropriate if it is ***reasonably supported*** by the best available scientific information. Such action need not await data that is 'certain.' For example, science will not be able to tell us, with certainty, whether a particular decline in estuarine function is directly attributable to Factors A through F; but it may still provide substantial indication that addressing Factors A, B or C are reasonably likely to produce a beneficial result. From a policy and legal perspective, this reasonableness standard is not only appropriate but imperative, even if the available science does not provide certainty or finality on the question asked. Adherence to a 'certainty' standard for ecosystem action and policy decisions is unreasonable and infeasible, and is likely to lead to further conflict, and ultimately will thwart achievement of the statute's directive that restoring the ecosystem be addressed as a co-equal goal.

Finance Plan Framework

Environmental Defense Fund commends the Delta Stewardship Council for stressing that robust and fair financing mechanisms are essential for the successful implementation of the Plan. We concur with the very important point in the Draft that"[S]imply stating the principle that beneficiaries pay and those who stress the Delta ecosystem should also pay does not resolve the necessary or appropriate level of the fees. Nor does it adequately ensure funds to pay for statewide and regional public benefits." We concur that public processes to determine a fair distribution of costs for implementing essential elements of the Delta Plan are warranted.

In particular, we support the Council's recommendation that the Legislature should create a Delta Flood Risk Management Assessment District. To date, funding levee repair has too often been a piecemeal process that needs to be fixed. We also support the Council's recommendation that the Legislature should pre-fund the Delta Stewardship Council, Delta Conservancy, and Delta Protection Commission for a period of 10 years.

Finally, while we support the concept of a "public goods charge" assessment for those who divert water, we believe this concept must be better fleshed out in subsequent drafts. If the funds are to be used only in the Delta watershed, then assessments ought to be only for diverters within the Delta watershed. It is also possible that polluters might pay into such a fund, as suggested

elsewhere in the financing section. But the next draft of the Delta Plan should include additional detail as to how the funds would be used as well as the potential magnitude of revenues that might be collected, even if a wide variety of alternatives are being considered. Without additional detail and explanation, it is not possible to evaluate this important recommendation

A Final Clarification Regarding Fish Declines

The draft states that: "From 1987 to 1992, a 6-year drought drastically reduced water deliveries, negatively affected water quality, and began a startling trend of fisheries decline that continues today." [at 17] This could be read to suggest that the estuary's fish populations were not declining until this point, or perhaps that fish declines were primarily due to the drought. For some species the initial decline coincided with the '87-'92 drought (e.g., longfin smelt). However, for others large scale declines were apparent years earlier, e.g., Delta smelt - which first collapsed in the early 1980s. The 1987-92 drought was also when Project exports reached a record high, hitting >6MAF for the first time in 1989 and again in 1990 (see 9/29/2011 Letter from P. Isenberg to D. Nelson and T. Erlewine). Water management during that period was generally not in alignment with ecological needs. From 1988-1992, Delta outflow (as % of unimpaired) was <40% in each year, reaching a record low 31% in 1989 and 1990. We recommend that the text be clarified on these points.

Thank you for the opportunity to provide our thoughts about the most recent Draft. EDF greatly appreciates the extraordinarily hard work of the Council and its staff in the development of this ambitious Plan, and look forward to working with you in the coming months.

Sincerely,

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